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JUL 8 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1152~~ 252

GRACE LINE, INC., ET AL.,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

BRIEF BY JAMES M. ESTABROOK AS *AMICUS CURIAE* ON BEHALF OF AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG, AKTIESELSKABET DAMPSKIBSSELSKABET "VESTERHAVET", AUSTRALIND STEAM SHIPPING CO., LTD., BLUE STAR LINE, LTD., COMPANIA COLOMBIA DE NAVEGACION MARITIMA, LTDA., COURT LINE, LTD., DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB, IVARANS REDERI A/S, MARINA MERCANTE NICARAGUENSE, S. A. NEW ZEALAND SHIPPING CO., LTD., PORT LINE, LTD., REDERIET "OCEAN" AKTIESELSKAB, WESTFAL-LARSEN & CO., A/S, AND WILH. WILHELMSEN IN SUPPORT OF PETITIONERS

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TABLE OF AUTHORITIES

Act of September 26, 1950, 64 Stat. 1038, 1042-3:

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BRIEF AS *AMICUS CURIAE* IN FAVOR OF PETITIONERS GRACE LINE, INC., ET AL

The undersigned as counsel for representative foreign shipowners respectfully files with the consent of the parties pursuant to Rule 42, Paragraph 1 of the rules of this Court, this brief as *Amicus Curiae*.

Statement of Facts

In addition to the facts set forth in the brief of Petitioners *Grace Line, Inc., et al.*, I note that in recent years the use of the Panama Canal by foreign shipping has greatly increased. As observed by the Court of Appeals (fn. 9), quoting the General Accounting Office 1955 Audit Report (p. 2) commercial tolls collected have increased as follows:

Tolls Revenue	*Foreign Flag*	*U. S. Flag*
1955	$23,442,170	$10,407,307
1952	16,935,823	9,986,708

Since Canals, like toll highways, operate with rather rigid costs, increase in volume may be expected to result in lower tolls. That has happened, for instance, at Suez.

Following the post-World War II activity in trade, tolls on the Suez Canal were reduced during private operation about 40% after 1946. In turn the increase in volume at Suez has been greater than that at Panama—partly at least due to traffic generated by the decreased rate.

POINT I

Charging non-Canal losses against Canal operation for tolls-fixing purposes deprives the Canal users of the lower toll which would otherwise result and is contrary to the progressive public policy of trade, not aid.

The opinion of the Court of Appeals and the briefs of the petitioners have demonstrated beyond doubt that Section 412(b), Title 2, of the Canal Zone Code, as shown both by language and legislative history do not contemplate that Canal operation be burdened, or affected, by non-Canal activities. Yet the Panama Canal Company, as shown by the Audit Reports of the General Accounting Office, has deprived Canal users of the benefits which the Canal users would otherwise receive by loading on Canal operations the losses of these other activities.

The result is unfair to Canal users and unlawful under the laws of the United States. It is moreover a most unfortunate precedent to set for other nations, many of which are under far greater pressures than the United States to exploit for purposes of national policy assets properly dedicated, like the Panama Canal, to the welfare of the world community.

POINT II

The United States treaty obligations in the Hay-Pauncefote Treaty require that damages for the Panama Company's disregard of law and consequent collection of excessive tolls should be awarded Canal users, certainly as that treaty was implemented by the Act of September 26, 1950.

The Hay-Pauncefote Treaty, expressly modeled on the Constantinople Convention of 1888, calls for "just and equitable charges." Clearly this means that if unjust and inequitable charges are collected, the excess should be refunded.

Even more clearly Courts here are traditionally the arbiters of what is "just and equitable". To relinquish this function to the executive would be an unfortunate international example.

By the Act of September 26, 1950 Congress explicitly defined "just and equitable". That definition was in no way remarkable; it provided for a toll sufficient to pay costs of operations and a return on investment measured by historical cost.

That Act also transferred the Canal to a corporation fully subject to suit and incorporated the "just and equitable charges" provision of the Hay-Pauncefote Treaty in the laws of the United States (Section 12, Amending Section 412(a), Title 2, Canal Zone Code).

It is well-settled in Anglo-American jurisprudence that the user of a public utility who is charged an excessive rate is entitled to reparation in the amount of the excess. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436.

Accordingly the duty of restitution which would formerly have been a matter of international negotiation is

now judicially enforceable in the courts of the United States.

To deny relief for past over-charges on the ground that there was no way of telling how the President would have exercised his Section 411 review power imputes to the President an extra legal function not called for by this legislation. To construe the Act of 1950 as authorizing the President to abrogate rather than enforce its policy is inconsistent with the basic concepts of the language of the statute, the legislative history and the Constitution.

There is no provision for discrimination in toll rates between ships of different nationalities. The President is given no power to retaliate, as far as Panama Canal tolls are concerned, against any foreign action. Such activity is reserved to other spheres. Consequently, policies involving air line routes and tariffs do not apply.

CONCLUSION

This Court should grant the petition of Grace Line Inc., *et al.*

Respectfully submitted,

JAMES M. ESTABROOK,

Amicus Curiae and Counsel for Aktieselskabet Dampskibsselskabet Svendborg, Aktieselskabet Dampskibsselskabet "Vesterhavet", Australind Steam Shipping Co., Ltd., Blue Star Line, Ltd., Compania Colombia de Navegacion Maritima Ltda., Court Line, Ltd., Dampskibsselskabet AF 1912 Aktieselskab, Ivarans Rederi A/S, Marina Mercante Nicaraguense, S. A., New Zealand Shipping Co., Ltd., Port Line, Ltd., Rederiet "Ocean" Aktieselskab, Westfal-Larsen & Co., A/S, and Wilh. Wilhelmsen in Support of Petitioners.